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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. [redacted] 197

MISSISSIPPI POWER COMPANY, ET AL.,
Petitioners,

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION,
Respondent.

BRIEF OF RESPONDENT SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION IN OPPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1379

MISSISSIPPI POWER COMPANY, ET AL.,
Petitioners,

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION,
Respondent.

No. 43,693 IN THE SUPREME COURT OF MISSISSIPPI

BRIEF OF RESPONDENT SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION IN OPPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

I. STATEMENT OF THE CASE

On March 7, 1963, the Mississippi Public Service Commission (called Commission) granted unto South Mississipppi Electric Power Association, a respondent herein

(called Respondent), a certificate of public convenience and necessity to construct and operate an electric generation and transmission system consisting of: (a) a 65,000 kilowatt (nameplate rating) generating station to be located in Jones County, Mississippi, and (b) approximately 392.6 miles of 69,000 volt transmission line extending from the generating station into 17 counties in the eastern and southeastern parts of the State.

The initial operation of the system would provide a wholesale supply of electricity at 26 delivery points to four of the nine corporate members of Respondent, to-wit: Dixie Electric Power Association, Laurel, Mississippi (all of its supply); Southern Pine Electric Power Association, Taylorsville, Mississippi (greater part of its supply); Pearl River Valley Electric Power Association, Columbia, Mississippi (all of its supply); and Singing River Electric Power Association, Lucedale, Mississippi (about half of its supply). These associations are electric public utilities which operate distribution systems and serve the public at retail.

These four associations were pursuant to motion of one of the Petitioners in the instant case (Mississippi Power Company) made parties to the proceeding before the Commission as "Respondents" and they of course continued as parties in the role of appellees when the case was appealed to the courts. They are respondents here but for convenience and to avoid confusion they will be referred to herein as the "Distributing Corporations."

Respondent is actually a federation of all of the electric power associations operating in the south half of Mississippi, nine in number, it having been organized in 1941 for the very purpose of providing generation and transmission services for its corporate members but only

four of them will receive power supplies from the initial operation.

Petitioners protested Respondent's application for the certificate before the Commission; appealed from the Commission's Order to the Chancery Court of the First Judicial District of Hinds County (the intermediate court of appeal in such cases); that Court having affirmed, they appealed to the Supreme Court of Mississippi; and, that Court having affirmed, they filed the Petition herein for a Writ of Certiorari.

Copies of the Order of the Commission, the Opinion of the Chancery Court, the Decree of the Chancery Court, the Opinion of the Mississippi Supreme Court and the Judgment of the Mississippi Supreme Court are appended to the Petition herein as Appendices 3, 4, 5, 1, and 2, respectively; therefore are not appended to this brief.

All that is said in this statement of the case is fully shown in the said appendices to the Petition herein.

II. PETITIONERS' STATEMENT OF THE CASE

The statement is fatally defective in respect of petitioners' Questions "B" and "C" (Petition, 3) in that it fails to meet the requirements of *Supreme Court Rule* 23-(f) in these particulars: (a) It does not "specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised"; (b) it does not specify "the method of raising them"; (c) it does not specify "the way in which they were passed upon by the Court"; (d) it does not set out "pertinent quotations of specific portions of the Record, or summary thereof, with specific references to the places in the Record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto,

assignment of errors as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

In point of fact, the said alleged federal questions "B" and "C" were not raised in any manner at any stage in any of the State forums.

Petitioners' statement (Petition, 10) that Respondent's tax exemptions (such as it enjoys) are shown by Exhibit 253 is simply not true. That exhibit consists of a large bundle of the work papers of a witness, an engineer, many of them rough and in longhand.

III. THE PARTIES

1. Respondent is a Mississippi corporation organized and operating under the Electric Power Association Act, Chapter 184, *Mississippi Laws of 1936* (Section 5463 et seq., Volume 4A, Recompiled, Mississippi Code of 1942). A copy of that Act as amended is annexed as Appendix No. 1. Respondent has full, plenary and unrestricted statutory and charter authority to carry on all types of electric utility operations—generation, transmission, and other, both within and without municipalities. It is a membership corporation organized and operated on a non-profit basis. It may and does have corporate members; in fact, has no members other than corporate members. Its members are nine electric power associations which are also organized and operate under the Electric Power Association Act but which are engaged in the transmission, distribution, and sale of electricity to the public at retail. They are: Singing River Electric Power Association, Lucedale, Mississippi; Dixie Electric Power Association, Laurel Mississippi; Southern Pine Electric Power Association, Taylorsville, Mississippi; Pearl River Valley Electric Power Association, Columbia, Mississippi; Coast

Electric Power Association, Bay St. Louis, Mississippi; Magnolia Electric Power Association, McComb, Mississippi; Southwest Mississippi Electric Power Association, Lorman, Mississippi; Capital Electric Power Association, Clinton, Mississippi; and East Mississippi Electric Association, Meridian, Mississippi. It will be observed that the four distributing corporations referred to above are among the members. Respondent has principal headquarters at Laurel, Mississippi. Its charter is in the Record (R. 14, 1549-1555).

2. Petitioner, Mississippi Power Company, is a foreign corporation organized and operating under the laws of the State of Maine but having offices in Gulfport, Mississippi. It carries on a business of generation, transmission, and distribution of electricity in the southeastern part of Mississippi. Its distribution reaches parts of 23 counties. Its scope of corporate powers is assumed for present purposes to be as broad as that of Respondent. Its charter and amendments under the laws of Maine are in the evidence. (R. 34, 4745-4831).

3. Petitioner, Mississippi Power & Light Company, was a foreign corporation organized and operating under the laws of Florida, having offices in Jackson, Mississippi, and carrying on a business of generation, transmission, and distribution of electricity in the western part of Mississippi (has since obtained a Mississippi charter). Its distribution reaches parts of some 46 counties. Its scope of corporate powers is assumed for present purposes to be as broad as that of Respondent. Its charter and amendments under the laws of Florida are in evidence (R. 34, 4833-4883).

4. The four distributing corporations aforesaid are corporations organized and operating under the Electric Power Association Act aforesaid. As such they have full,

plenary and unrestricted statutory and charter authority to carry on all types of electric utility operations—generation, transmission, and other, both within and without municipalities. They are membership corporations, organized and operated on a non-profit basis. The scope of corporate powers of each of these corporations is in all respects equal to those of Respondent and the Petitioners. The charters of these four corporations, in this order, Singing River, Dixie, Pearl River Valley and Southern Pine are in the evidence (R. 33, 4672-4689; R. 33, 4691-4704; R. 33, 4706-4719; and R. 34, 4721-4743), respectively.

5. Respondent, Petitioners, and the distributing corporations are each and all "public utilities" under the Public Utility Act of 1956 (Chapter 372, *Mississippi Laws of 1956;* Section 7716-01, et seq., Volume 6, Recompiled, *Mississippi Code* of 1942) herein called the "Public Utility Act," a copy of which appears as Appendix No. 6 to the Petition herein.

IV. ARGUMENT

1. Due Process

There has been no denial of due process because: (a) the grant of so-called "grandfather" rights under Section 5(b) of the Public Utility Act as implemented by the grandfather certificates issued by the Commission to the Petitioners, respectively, gave Petitioners no more than the right to continue to operate facilities and sell and deliver bulk power at wholesale to the distributing corporations so long as those corporations desired to continue purchasing power at wholesale from Petitioners at such delivery points and the public convenience and necessity was subserved thereby; (b) the provisions of Section 5(f) of the Public Utility Act have no application to the sale of bulk power at wholesale by one electric utility

to another electric utility, but only to service to the public within a utility's certificated service area; (c) the distributing corporations are public utilities of equal legal status with Petitioners and have full authority under the statutes under which they are chartered and operate to generate and transmit their own power supply; and (d) Respondent being simply a federation of nine electric power associations (of which the distributing corporations are four) organized for the purpose of generating and transmitting power for distribution and sale through their respective systems, that is precisely what the distributing corporations are to do—generate and transmit their own power supply.

The State Supreme Court has held that the foregoing is the meaning of the State statutes involved as applied to the facts of the instant case, and this court will accept the State Court's interpretation of State statutes. In its opinion handed down February 14, 1966 (unofficially reported in 183 So. 2d 163), that Court said:

> "The protestants further contend that the order of the commission was erroneous in that it impaired valuable rights existing in them by virtue if the 'grandfather' certificates they hold which authorize them to sell electric energy to the power associations. They cite Capital Electric Power Ass'n v. Mississippi Power & Light Co., 240 Miss. 139, 150, 125 So. 2d 739, 743 (1961) wherein we held:
>
> "'Having served the electrical requirements in the Elton area for more than 17 years, Capital Electric, under paragraph (b) of Section 5, Laws of 1956, Section 7716-05, Code of 1942, acquired the right to a certificate of convenience and necessity therein, being in truth and in fact a franchise from the State. Such right is indeed a valuable one.'
>
> "The certificates of the protestants authorize the sale

of electricity to specified delivery points. The certificate of Mississippi Power Company is restricted by the following language of the commission:

> "'The commission is not hereby adjudicating the legal effect of the certificate herein granted as to service to the aforesaid associations, nor is the commission determining in this proceeding that the certificate herein granted binds said asociations, to continue receiving such service.'

"'There can be no doubt the protestants will be affected to some degree by the certificate granted to the petitioner as .32% of Mississippi Power & Light Company's 1960 business stemmed from its sales to the associations and 4.14% of the business of Mississippi Power Company from its sales for the same period. The generating facilities of the petitioner will supplant these sales to the associations. It is well to keep in mind that petitioner is a federation of nine power associations, respondents being four of them, so *in essence* petitioner is a corporation through which *the associations will generate their own power as they have the statutory right to do under the Electric Power Association Act,* Chapter 184, Mississippi Laws of 1936, Mississippi Code Annotated section 5463 et seq. (1956). The issue thus restricts itself to *this narrow question*: Do the protestants by their certificated rights to sell, which we have held to be valuable, acquire by the certificates the absolute right to continue these sales to a utility which desires to generate its own electricity and which has a statutory right so to do? An affirmative answer to this question would indeed render the petitioners captive customers of the protestants who are in reality their competitors. We find no comfort in the authorities cited by counsel nor were we able to find direct authorities by our own research to answer this perplexing question. We turn again to the commission's finding and order as to the results we should reach. It found:

"'For a number of years there has been a constant need for additional generation and transmission facilities in this state and this need will continue to grow. The need for more generating capacity is greater than the capacity of the facilities which the petitioner proposes to construct and operate. This is true despite the splendid interconnections which protestants have with other sources and systems within their own respective groups * * *'

"In candor we should state that the commission has not found the services of either of the protestants to be inadequate, but rather found, as noted, there was a need for additional generating capacity broad enough to encompass the 65-megawatt generating facility authorized. Under these circumstances (a deficit of generating capacity) we are of the opinion that the commission *properly held* the *needs of the public* above the grandfather certificates of the protestants as we are of the opinion that it was *not the legislative intent that a prandfather certificate under Section 7716-05(b) was to supersede the Electric Power Association Act, Chapter 184, Mississippi Laws of 1936, which authorized the associations to generate their own energy.* The so-called 'franchise' doctrine, referred to in the Elton case for example, does not apply to the issuance of a certificate of convenience and necessity for a wholesale electric transmission line. Such a certificate is a privilege, regulated and controlled by the state within due process limitations. The idea that a franchise or charter granted by the state may be immutable and unamendable by the state was finally and effectively eliminated by the 1890 Constitution. Mississippi Constitution 1890 §§ 178, 179, 180, 181, 182; cf. Southern Bell Tel. & Tel. Co. v. City of Meridian, 241 Miss. 678, 131 So. 2d 666 (1961). In reaching this conclusion we note that the loss of sales by the protestants, though not insignificant, is not total as the energy may be diverted to their own needs for which there is ample demand.

"Protestants contend further, however, that under the provisions of Section 7716-05(f) they are entitled to the particulars of any inadequacy of service, either under the 'existing facility' or 'valuable franchise' rule, and that they must be afforded a reasonable time by the commission to correct such inadequacy. This statute provides:

> "'(f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate service in any *area* covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder of the certificate, its certificate for the *area* affected, may be revoked and cancelled by the commission. (Emphasis ours.)'

"Protestants urge that since the petitioner did not directly follow the statutory remedy for inadequacy, that, in effect, the petition under Section 7716-05(c) (certificate of public convenience and necessity) is a collateral attack upon their valuable franchise rights and they are deprived of due process thereby. We are of the opinion this contention is not well taken as the *statute refers to a specific service area* and *not* to a *facility* (delivery point) *as here,* and there is no finding that the protestants are not rendering 'reasonably adequate service', and by the plain terms of the statute the remedial provisions thereof are not applicable until there be such finding. We conclude that this assignment of error is not well taken and that the

protestants' constitutional rights were not violated by the order of the commission in this proceeding.

> "The electric power associations are products of legislative enactment. They are privileged to use the powers granted in such enactment and are of course subject to its limitations. As such they have legal *status comparable to other utilities* without this Court's opinion as to the underlying philosophy of the act." (Emphasis ours except where shown to be by the Court.)

The rule referred to by the Court as the "existing facility" or "valuable franchise" rule was one adopted by the Court many years ago in respect to the operations of public carriers, and it was in effect written into the Public Utility Act as Section 5 [f] thereof. As the Court said in *Capital Electric Power Association* v. *Mississippi Power & Light Company*, 240 Miss. 139, 125 So. 2d 739, 1961 [referred to at one point in the quotation above as the "Elton Case"]:

> "The (Public Utility) Act, by its own terms, adopts as applicable to electric utilities the generally established rule in this state as to the other public utilities: An existing utility within the certificated area has the right and duty to provide the service, and must be given that opportunity. If it fails, the commission can award another franchise to another utility. Section 5 (c) and (f) makes this clear. Hence the rule in the case as involving common carriers applies in this respect."

Inasmuch as the grandfather certificates issued to Petitioners under the Public Utility Act (1956) did not impair the authority of the distributing corporations (through Respondent) to generate and transmit their own power supply under the Electric Power Association Act (1936); and the "existing facility" or "valuable franchise" rule has

no application to generation of transmission nor to wholesale transactions between or amongst utilities but only to service to the public in certificated service areas; there was no violation of due process in the form of impairment of the certificated rights of Petitioners or otherwise when the Commission found from the evidence that the public convenience and necessity required that the distributing corporations (through Respondent) generate and transmit their own power supplies; and certainly none when the State Courts found that the Commission's Order was supported by substantial evidence and affirmed it.

No Mississippi case cited by Petitioners involved generation and transmission or wholesale transactions between utilities; all involved disputes over the right to render service to the *public* within a *certificated service area.* In such a case the certificate holder's right to serve is exclusive unless it fails or refuses to provide reasonably adequate service; but no such case is presented here.

(Petitioners' cases from other jurisdictions are equally irrelevant, as will be shown later herein.)

Prior to enactment of the Public Utility Act, Petitioners did not have the right to provide a wholesale supply of power to the distributing corporations as "captive customers . . . who are in reality their competitors" (this case, 183 So. 2d at 170) for an indefinite period of time or for any period at all; our State Court of last resort has held that the grandfather clause of the Public Utility Act as implemented by the grandfather certificates did not grant them such a right; therefore, when the public convenience and necessity required that the distributing corporations generate and transmit their own power supply, there was no legal barrier to the Commission's authorizing them to do so.

Petitioners seek to obtain the benefits of the existing facilities or valuable franchise rule upon the assumption that they are "public utilities" and the distributing corporations are "the public" and deliveries of power by them to the corporations although in bulk at wholesale is "service" to the public.[1] The assumption is manifestly erroneous. The distributing corporations have exactly the same legal status as public utilities, both as to rights and responsibilities, as do Petitioners. As said by our State Supreme Court in this case (183 So. 2d at 171), ". . . they have legal status comparable to other utilities. . . ."

Petitioners assert (Petition, 14), "It is reflected in the Record . . ." that they have since receiving grandfather certificates expended "large sums of money" with the view to continuing to supply power at wholesale to the distributing corporations. But this point fails entirely for two reasons: First, Petitioners do not cite a place in the Record where such is shown and could not do so for there is none; and, second, if they assumed that they had a continuing right, such as that afforded by the existing facility or valuable franchise rule, and expended sums of money upon that assumption, they acted upon an erroneous assumption of law and did not gain any rights in doing so.

As was said by the Court of Appeals, Fifth Circuit, in *REA* v. *Central Louisiana Elec. Co.*, 354 F. 2d 859 (5th Cir. 1966), in response to a similar point made in that case by the commercial power companies of Louisiana:

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1. Example, Petition, page 15: "Due process of law would have required that such property rights could not be cancelled or divested unless and until it had been shown that the Petitioners were not rendering satisfactory or adequate *public service* thereunder." (Emphasis ours).

"Appellees have no doubt known all along that they did not hold exclusive franchises. Since 1936 they have known of the Rural Electrification Administration, its powers and purposes. They have made investments and conducted operations in an awareness that the Rural Electrification Administration was in business, with power to make a loan to someone to finance the construction of generators and transmission facilities. The appellees have been and are now doing business with cooperatives established and financed under the REA Act. The record shows no intention or attempt to abrogate *existing contracts* between the parties. Appellees do not have a Constitutionally guaranteed, unrestricted privilege to engage in business free of competition. Cf. Nebbia v. People of State of New York, 291 U.S. 502, at 527, 54 S. Ct. 505, 78 L.Ed. 940.

"Does the case raise anything more (in the words of Dillon) than 'mere economic competition made possible by governmental action'? We think not.

"Without repeating what has already been said, the proof simply shows that whereas the companies have heretofore been the sole occupants of this particular territory, they are to be replaced at some date in the future by a competitor financed under a Federal statute now nearly thirty years old. They are to completely lose customers which heretofore they alone had, but *this is not an unusual product of competition.*

"Under the rule of Pennsylvania Railroad Company v. Dillon, supra, this eliminates from consideration the allegation of illegal acts by the REA Administrator."

The "cooperatives established and financed under the REA Act" referred to by the Court were corporate members of the generation and transmission cooperative in Louisiana to which the REA loan had been made just as the distributing corporations here are the corporate members of the generation and transmission cooperative in Mississippi to

which the loan was made. Of course, in neither instance were the cooperatives "established" under the REA Act, they being in both instances chartered under State law, but they were in both instances "financed under the REA Act."

The authorities from jurisdictions other than Mississippi cited by Petitioners on this question are in nowise applicable. They will be briefly noticed as follows:

Owensboro v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58 (1913). This old decision by a divided court (5 to 4) arose out of a situation where in 1889 the City of Owensboro, Kentucky, by ordinance, granted to Cumberland Telephone & Telegraph Company the privilege of erecting "any number" of poles upon the streets of the city for the operation of its business free of charge (no time limitation); the company at once erected a large plant to operate throughout the city involving a large investment and was so operating; in 1909 the city adopted an ordinance giving the company the alternative of (a) removing all of its facilities from the streets, alleys, and public places of the city "within a reasonable time," or (b) purchasing from the city a franchise at a negotiated price.

It was held that the "offer" by the city of the free use of the streets without time limitation and without any reserved right in the city to alter, amend, or repeal the ordinance by which the offer was made had been duly "accepted" by the company by means of the building of its plant and operating the same throughout the city over the years; thus, a contract had ripened between the parties which would be protected under the contract clause of the Federal Constitution.

Detroit v. *Detroit Citizens St. Ry.*, 184 U.S. 368 (1902). Pursuant to express statutory authority, the city entered into a contract with the utility *inter alia* fixing the maxi-

mum fares which the utility might charge passengers for a fixed term of years. Thereupon millions of dollars were expended in the construction of transportation facilities and the purchase of transportation equipment, and the operation was conducted in the city in accordance with the franchise with fares being charged in accordance with the agreement. Before the term expired, the city assumed to pass ordinances (under provisions in the prior ordinances reserving rights in the city to regulate the operation which the city supposed included authority to reduce fares) reducing the fare schedule. Suit for injunction was instituted to restrain the city from enforcing such ordinances. It was held that the contract fixing fares for a term of years was fully authorized by statute; that the reservations of rights to adopt other ordinances for the regulation of the utility's operations were not intended to and did not include authority to reduce the fares which had been agreed upon; and that therefore a contract existed which would be protected under the contract clause of the Federal Constitution.

Boise Artesian Hot & Cold Water v. *Boise City*, 230 U.S. 84 (1913). In 1889, the city granted a non-exclusive easement in perpetuity to two individuals to "lay and repair pipes" in the streets for the operation of their water works in supplying water in the city. In 1890 it granted a similar easement to a corporation engaged in the same type operation. Both grantees immediately accepted the easements, built systems, and rendered service. Both systems were later conveyed to Boise Artesian Hot & Cold Water Company. That company continued to add to the combined systems and provide a water supply service throughout the city. Later still, the city repented of having granted free easements in perpetuity and adopted an ordinance attempting to levy a rental of $300 per month upon the utility for "use and occupancy of the streets and alleys"

of the city. The question presented was as to the validity of the ordinance levying the charge. It was held that, the easements having been "accepted" and acted upon in good faith, and the city having been fully empowered to grant them, contracts had ripened which would be protected under the contract clause of the Federal Constitution.

It is apparent that none of these cases is applicable in the instant case. They apply an old and familiar principle, but that principle is not involved here. Here there can be no question but that prior to enactment of the Public Utility Act (1956), Petitioners had no vested right whatsoever to continue for any given period of time the sales of bulk power at wholesale to their sister utilities, the distributing corporations; our State Court of last resort has expressly held that the Public Utility Act, as implemented by the grandfather certificates issued to Petitioners, did not grant to them any such right; thus it is manifest that they have never had and do not now have any such right. There was therefore no contract clause barrier to the Commission's authorizing the distributing corporations to generate and transmit their own power supplies upon the factual determination by the Commission that the public convenience and necessity required that this be done.

This Court accepts the interpretation of a state court of last resort as to the meaning of a state statute. The Supreme Court of Mississippi is the Court of last resort in this State. MISS. CONST., art. 6, §§ 144, 146; MISS. CODE ANN., §§ 1941-1993 (1956). As has been shown hereinabove, that Court has explicitly held in this case (183 So. 2d at 170-171) that the Electric Power Association Act (1936) authorized the distributing corporations to generate and transmit (through Respondent) their own power

supplies; that the Public Utility Act (1956) as implemented by grandfather certificates issued thereunder to Petitioners, did not diminish that authority; and that there is no conflict in the two statutes in this respect. To repeat for emphasis a brief excerpt from a quotation set out above, the Court said:

> "Under these circumstances (a deficit of generating capacity) we are of the opinion that the Commission properly held the needs of the public above the grandfather certificates of the protestants as we are of the opinion that it was *not the legislative intent* that a grandfather certificate under Section 7716-05(b) was to supersede the Electric Power Association Act, Chapter 184, Mississippi Laws of 1936, which *authorized the associations to generate their own energy.*" (Emphasis ours).

In 3 *Cyc. Fed. P.*, § 6.14 (3d ed.), it is said:

> "State decisions construing state statutes and municipal ordinances are to be followed as the rule of decision in federal courts. The same rule applies to the construction of state constitutions, and it also applies to the interpretation of state administrative orders under authority of state statutes."

In *Albertson* v. *Millard,* 345 U.S. 242 (1953), there was an appeal by plaintiffs from a judgment of the United States District Court for the Eastern District of Michigan holding that the Michigan Communist Control Bill was constitutional. This court held:

> "The construction given to a state statute by the state courts is binding upon the federal courts. There has been no interpretation of this statute by the state courts. The absence of such construction stems from the fact this action in federal court was commenced only five days after the statute became law.

> "There is pending in the Circuit Court for Wayne County, Michigan, a bill seeking a declaratory judgment that the Act is unconstitutional, both on federal and state grounds. That action is being held in abeyance pending our mandate and decision in this case.
>
> "We deem it appropriate in this case that the state courts construe this statute before the District Court further considers the action (Citing cases).
>
> "The judgment is vacated and the cause remanded to the District Court. . . ."

In *United States* v. *Burnison*, 339 U.S. 87 (1950), two appeals were combined for decision and they involved the power of the California Supreme Court to declare invalid testamentary dispositions to the United States by two California residents. This Court said:

> "The California Court construed Section 27 of the California Probate Code to prevent a California domiciliary from making an unrestricted testamentary gift to the United States, although such a gift may be made to California, its counties and municipal corporations. The court arrived at this interpretation despite the contention of the United States that it would raise serious constitutional questions. The construction of the California Code by the California Supreme Court is, of course, binding on us. It leaves us, however, with the federal constitutional questions that the United States urged the California Court to avoid."

Accord: *Shuttlesworth* v. *Birmingham*, 86 S. Ct. 211 (1965); *Cramp* v. *Bd. of Public Instruction*, 368 U.S. 278 (1961); *Clay* v. *Sun Ins. Office*, 363 U.S. 207 (1960); *Kingsley Corp.* v. *Regents of U. of N. Y.*, 360 U.S. 684 (1959); and *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167 (1959).

It is therefore submitted that the Public Utility Act of Mississippi, as construed and applied by the Supreme Court of Mississippi, does not deprive Petitioners of prop-

erty rights without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

2. Equal Protection of Laws

Petitioners' Question "B" (Petition, 3), as to whether the State has denied to Petitioners the equal protection of its laws because Respondent enjoys certain tax exemptions under State law not accorded to Petitioners may not be considered by this Court because it was not presented to or considered by the forum of first instance (Commission), the intermediate court of appeal (Chancery Court) or the Court of last resort (Supreme Court) of the State. The question was not even presented in either of the suggestions of error (petitions for re-hearing) separately filed by the Petitioners in the Supreme Court of Mississippi.

> Note: Upon motion of Petitioners and over vigorous objection of Respondent, the Supreme Court of Mississippi permitted the original record in that Court to be certified and filed in this Court in lieu of the transcribe required by Rule 21 of this Court. Therefore, Respondent, not having access to the record except by making a trip to Washington, is unable to cite the volume and page where various pleadings, etc., of Petitioners (protests, motions, assignments of error, etc.) may be found so that the Court might examine them and confirm that the said question was not raised or considered in any state forum, but such is not needful because: (1) Rule 23(f) places the burden upon Petitioners of setting out specific data with respect to any question sought to be reviewed in this court and failure to do so is fatal; (2) Respondent has no duty to aid Petitioners in this behalf; and (3) where Petitioners fail to carry this burden the court will not, with or without the aid of Respondent, sift the record (this one being more than 12,000 pages in 82 volumes) in search of a reviewable federal question for the benefit of Petitioners.

For convenient reference, *Supreme Court Rule* 23(f) is quoted at this point:

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised *so as to give this court jurisdiction to review the judgment on writ of certiorari.*" (Emphasis added).

That the question may not be presented and considered in this Court for the first time is well established. *Beck* v. *Washington*, 369 U.S. 541 (1962).

Texts in accord: 54 Am. Jur., *United States Courts*, § 216 (1962); 36 C.J.S., *Federal Courts*, § 274 (1) (1960).

In the Beck case, this Court said:

> "Secondly, it is said that the Washington statute permitting persons in custody to challenge grand jurors, Revised Code of Washington § 10.28.030, denies equal protection to persons not in custody who are investigated by grand juries. This point is not properly before this court. Although both opinions of the Washington Supreme Court discuss the *interpretation of* §10.28.030, neither considered that question in light of the equal protection argument for that argument was never properly presented to the court in relation to this statute. . .

". . . Nor was the equal protection contention made at all in the petitions for rehearing filed after the Supreme Court had agreed with the lower court's interpretation of the statute to exclude petitioner. Assuming arguendo that for the purposes of our jurisdiction the question would have been timely if raised in a petition for rehearing, not having been raised there or elsewhere or actually decided by the Washington Supreme Court, the argument cannot be entertained here under an unbroken line of precedent. *E.g., Ferguson v. Georgia, 365 U.S. 570, 572, 5 L.ed. 2d 783, 785, 81 S. Ct. 756 (1961); Capital City Dairy Co. v. Ohio, 183 U.S. 238, 248, 46 L.ed. 171, 176, 22 S. Ct. 120 (1902)." (Emphasis by the Court).

In addition to cases cited by the court in the above quotation, see also *Old Jordan Mining and Milling Co.* v. *Societe Anonyme Des Mines De Lexington,* 164 U.S. 260 (1896) which is in accord.

In accord by analogy as cases going up from Federal Courts: *Giacoma Reina* v. *United States,* 364 U.S. 507 (1960); *Pollard* v. *United States,* 352 U.S. 354 (1957); *De Sylva* v. *Ballentine,* 351 U.S. 570 (1956); *McCullough* v. *Kammerer Corp.,* 323 U.S. 327 (1944); *Zellerbach Paper Co.* v. *Helvering,* 293 U.S. 172 (1934); *Duignan* v. *United States,* 274 U.S. 196 (1927).

In the *Beck* case, supra, the court took special notice of the fact that the constitutional attack had not been properly submitted to the trial court; that the Washington Supreme Court refused to recognize issues not properly presented in the trial court; that the petitioner had failed to present his constitutional objection before the Washington Supreme Court, which was bound by Rule 43 of the Rules of Appeal, Revised Code of Washington, to refuse to consider alleged error not contained in the assignments of error; that the Washington Supreme Court

refused to sift through briefs to determine what could have been included within assignments of error; and that the Washington Supreme Court deemed an error not urged in the brief as abandoned. Finally, the court observed that the purported constitutional defense was not urged in the petition for rehearing filed with the Washington Supreme Court. All of the foregoing is directly parallel to the case at hand and to applicable law and rules of court as they obtain in the State of Mississippi.

The Petitioners had waived and abandoned any right to raise the purported federal question sought to be reviewed long before filing their petition for writ of certiorari and even before reaching the Mississippi Supreme Court. It is well established that the Mississippi Supreme Court has limited jurisdiction as a court of appeals and therefore has no jurisdiction to consider an issue that has not been previously presented and duly considered and adjudicated by a trial court. MISS. CONST., art. 6, § 146; MISS. CODE ANN., § 1945 (1956). For this reason, petitioners were required to make proper presentation of the purported federal question to the trial forum and to the intermediate court of appeal (Chancery Court) and, having failed to do so, petitioners were deemed to have abandoned and waived their purported federal question even before reaching the Mississippi Supreme Court.

The fact that an issue not presented to the intermediate court of appeal cannot be presented for the first time before the Mississippi Supreme Court has been recognized by a long line of cases, including *State* v. *Carraway*, 160 Miss. 263, 134 So. 846 (1931), which held that:

> "In the present case there were no assignments of error filed in the circuit court raising the other questions, and none can be noticed on the appeal here. This court only reviews matters presented to the court below."

Accord: *Coleman* v. *Gordon*, 16 So. 340 (Miss. 1894); *Matthews* v. *Cotten*, 83 Miss. 472, 35 So. 937 (1904); *Gulf, Mobile & Northern Ry.* v. *Hardy*, 151 Miss. 211, 117 So. 536 (1928); *Merrill Engineering Co.* v. *Bolton & Carr*, 119 So. 354 (Miss. 1928); *Reynolds* v. *Century Life Ins. Co.*, 155 Miss. 890, 125 So. 99 (1929); *Lott* v. *Watkins*, 162 Miss. 507, 137 So. 895 (1931); and *Richardson* v. *Flowers*, 194 Miss. 105, 11 So. 2d 808 (1943).

Thus, petitioners effectively waived and abandoned their purported federal question before the state courts and, having done so, they have effectively waived and abandoned any right to obtain review of the same here, under the rules and decisions of this Court.

If the issue had been before the State tribunals, there would have been no difficulty whatever in establishing sound bases for such tax exemptions as Respondent enjoys. It does not have total tax exemption by any means. Even Section 9700, MISS. CODE ANN. (Supp. 1964), quoted on pages 4 and 5 of the Petition has been revised by Senate Bill 1693 of the 1966 session of the Mississippi Legislature, approved by the Governor, April 13, 1966, to remove certain of the exemptions. Thus, Petitioners' quotation of the section in their petition filed herein June 3, 1966, is erroneous, but since the question cannot be considered, no need is perceived for annexing as an appendix hereto a copy of Senate Bill 1693.

Petitioners virtually concede that if the distributing corporations were operating the generating and transmission facilities to provide their own power supplies such tax exemptions as electric power associations enjoy would be justified by the "objective of promoting the use and development of electric service in rural areas" (Petition, 17); and the State Supreme Court has held that the gen-

eration and transmission operation by Respondent for the benefit of the distributing corporations is precisely that,—the distributing corporations generating and transmitting their own power supply:

> "It is well to keep in mind that Petitioner (South Mississippi Electric Power Association) is a federation of nine power associations, Respondents (the distributing corporations) being four of them, so in essence Petitioner is a corporation through which the associations will generate their own power as they have the statutory right to do under the Electric Power Association Act, Chapter 184, Mississippi Laws of 1936, Mississippi Code Annotated, Section 5463, et seq. (1956)." (183 So. 2d at 170).

Under Petitioners' own authorities, if they had a grievance concerning unequal taxation, their remedy would be a suit against the taxing authority to enjoin collection and declare the tax unlawful. They could not simply submit to the tax and collaterally plead the handicap to keep competitors out of the field. *Hillsboro Township* v. *Cromwell,* 326 U.S. 620 (1946); *Puget Sound Power & Light Co.* v. *Seattle,* 291 U.S. 619 (1934); and *Royster Guano Co.* v. *Virginia,* 253 U.S. 412 (1920).

In any event, it is certain that under what this Court termed "an unbroken line of precedent" (*Beck,* supra), the question may not be considered in the instant case.

Petitioners' authorities would not be relevant if such a question could be considered here; but since the question may not be considered, we forego burdening this brief with discussion of them.

3. Interstate Commerce

Petitioners' Question "C" (Petition, 3) with respect to whether the State has created an undue burden upon interstate commerce may not be considered by the Court

for the very same reasons as are set out hereinabove with respect to their Question "B". The said Question "C" was not presented to or considered by the forum of the first instance (Commission), the intermediate court of appeal (Chancery Court) or the Court of last resort (Supreme Court) of the State. The question was not even presented in either of the suggestions of error (petitions for rehearing) separately filed by Petitioners in the Supreme Court of Mississippi.

To avoid repetition, therefore, all that is said above as to why the court may not consider in the instant case Petitioners' Question "B" is adopted as applying also to their Question "C".

Here again, Petitioners' authorities have been examined and found to have no relevancy, but since the question may not be considered, we forego any discussion of them.

4. Rural Electrification Administration Loan

Petitioners' Question "D" (Petition, 3) apparently seeks to raise the question as to whether Mississippi's Public Utility Act is violative of 7 U.S.C.A., § 904, because the Administrator of Rural Electrification Administration (called REA) has approved a loan to Respondent, the proceeds of which will be used in Respondent's capital requirements. The question is perplexing and standing alone would not be understandable. From the passage of the argument devoted to it (Petition, 21-22), it appears that Petitioners seek to litigate in this case the legality *vel non* of the act of the Administrator of REA in making a loan to Respondent (presumably with the thought that if this source of credit were lost to Petitioner it might not be able to finance its proposed system, and Petitioners would be benefited thereby).

Petitioners may not litigate in this case the legality of the act of the Administrator in making such loan; indeed, they may not litigate that question in any case or court. They lack standing to do so. *Alabama Power Co.* v. *Ickes,* 302 U.S. 464 (1938); *REA* v. *Central Louisiana Elec. Co.,* 354 F. 2d 859 (5th Cir. 1966); *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (D.C. Cir. 1955), cert. den., 350 U.S. 884 (1955); *Alabama Power Co.* v. *Alabama Elec. Co-op.,* 249 F. Supp. 855 (M.D. Ala. 1965); *Alabama Elec. Co-op.* v. *Alabama Power Co.,* 176 So. 2d 483 (Ala. 1964), rehearing, 176 So. 2d 483 (Ala. 1965); *Capital Elec. Power Ass'n* v. *Mississippi Power & Light Co.,* 250 Miss. 514, 150 So. 2d 534 (1963); *Delta Elec. Power Ass'n* v. *Mississippi Power & Light Co.,* 250 Miss. 482, 149 So. 2d 504 (1963); *Capital Elec. Power Ass'n* v. *Mississippi Power & Light Co.,* 240 Miss. 139, 125 So. 2d 739 (1961).

In *Alabama Power Co.* v. *Ickes,* supra, Alabama Power Company instituted suit in the U. S. District Court, District of Columbia, to enjoin an officer of the United States from making loans (alleged to be illegal) to Alabama municipalities to construct electric distribution systems, which it was alleged would take business away from Alabama Power Company and virtually put it out of business. It was held that the company had no standing to raise the question of the legality of the loan; the municipalities had authority under *State law* to engage in the distribution business; and in the words of the court: "What Petitioner anticipates, we emphasize, is damage to something it does not possess—namely, a right to be immune from lawful municipal competition."

In the *Kansas City* case, the Court of Appeals followed the *Alabama* case and held that the complaining power companies had no legal standing or litigable in-

terest to challenge the validity of a series of generation and transmission loans (such as is involved in the instant case) by REA to co-operative corporation borrowers.

In the *Alabama Elec. Co-op.* case (in the State court), the Supreme Court of Alabama reviewed the history of cases involving the question beginning with the *Kansas City* case, supra, and said:

> "It has been consistently held that the legality of a loan approved by the Administrator of the REA is not subject to a collateral attack in a hearing before a public service commission or the duly constituted state authority which, in Alabama, is the Director of Finance. Re Southern Maryland Elec. Co-op., Inc., 49 PUR 3d 163; Re Missouri Electric Power Co., 50 PUR (NS) 257; Re Iowa Utilities Co., 47 PUR (NS) 321; State ex rel. Consumers Public Service Co. v. Public Service Commission, 180 S.W. 2d 40; Missouri Power & Light Co. v. Lewis County R.E.C. Ass'n, 149 S.W. 2d 881. In each of these decisions, the question of the violation of the central station service feature of federal act was raised but, in each instance, the decision was in favor of the cooperatives. In view of the authorities cited supra, we feel that we cannot agree with the contention of the appellees that this is a question on which we should pass."

In the case of *Alabama Power Co.* v. *Alabama Elec. Co-op.* (Federal District Court), supra, the question was not raised collaterally as it was in the State Court case and as it is in the instant case but was raised in a bill for injunction filed by Alabama Power Company against the cooperative, Rural Electrification Administration and its Administrator, the United States Department of Agriculture and its Secretary seeking to enjoin the making of a generation and transmission loan exactly similar to the one involved in the instant case. In an able opinion, the learned district judge likewise reviewed the history of cases involving the question and concluded:

> "The law is clear that where prior REA loans have been challenged by plaintiffs occupying essentially the same status as the Alabama Power Company occupies here and for basically the same reasons that the Alabama Power Company advances here, there is no standing to challenge the loans in a judicial proceeding . . . (Citing cases). . . ."

Perhaps the most illuminating case of all on this point is that of *REA v. Central Louisiana Elec. Co.*, supra. Plaintiffs in that case (commercial power companies just as here) sued in the United States District Court for the Western District of Louisiana to enjoin the Administrator of REA from making a loan to Louisiana Electric Cooperatives, Inc. (a federation of rural electric distributing corporations just as here) to construct a generation and transmission system to serve its corporate members. Among the grounds alleged for injunctive relief was the point presently under consideration (the loan allegedly violated 7 U.S.C.A., § 904, because made to serve persons already receiving central station service).

The District Court granted a temporary injunction. The Court of Appeals reversed. The opinion thoroughly explored prior decisions relating to the questions of the standing of the plaintiffs to sue and the authority of the Court to review and held that the plaintiffs had no standing to sue nor did the Court have jurisdiction to review the granting of a loan by the Administrator of REA. In the course of the able Opinion by Judge Coleman, the court said:

> "From the entire history of the Rural Electrification Act and its administration we are totally convinced that Congress has never enacted or intended that loans by this Agency should be reviewable in the courts. The Act itself makes no provision for judicial loan review. By the allegations of the Complaints we

are informed of the thorough manner in which Congress has ridden herd on the REA. Congressional Committees caused the promulgation of REA Bulletin 111-3, which appellees now say has been violated. Certainly, the demands of Congressional Committees do not have the force of law. Congress has seen fit not to enact these particular demands into law, evidently being most content to rely on the deadly sword constantly in its own hands, that is, the sole control of the purse out of which the loans are made. Regardless of how outrageous or unfair the making of this loan may seem, the remedy is not in the courts but in the Congress.

. . .

"Appellees here are not parties to the loan. Appellees are not being *granted* or *denied* a loan in violation of the law or in violation of regulations having the force of law. They are not having any penalty or forfeiture directly assessed against them. They come into court to halt a loan to a third party, contending that the loan is being illegally made and, in the future, will cause illegal consequences. Their only standing for this is their natural opposition to having territory invaded which heretofore has been de facto their sole domain but in which they have no exclusive right.

. . .

"We consider it completely appropriate to say that this Court has approached this case with sincere deference for the findings and views of the able and conscientious Judge who heard it in the first instance. We are nevertheless constrained to the opinion that appellees did not have the requisite standing to bring this action and neither do the Courts have jurisdiction to review the granting or denial of loans by the Rural Electrification Administration. Congress has not conferred such jurisdiction by specific language; Congressional action negates rather than implies an intent to confer such jurisdiction. The Judgment must be reversed." (Emphasis by the Court).

It is manifest therefore that Petitioners have no standing to litigate the legality *vel non* of the loan made by REA to Respondent, not even in a direct attack by way of a bill for injunction; *a fortiori*, not by collateral attack such as is made here.

The Supreme Court of Mississippi decided only as much as was necessary to be decided on the point, namely, that it could not be raised collaterally and was not properly before that Court. The Court said:

> "Finally, protestants contend that the commission's order should be reversed because public convenience and necessity cannot be predicated upon the operation of facilities in violation of law. They urge that public convenience and necessity fails when it is shown without dispute that the terms of the federal statute (Title 7, section 904, U.S.C.A.), and the terms of the loan agreement itself would be violated in that the loan would be used to duplicate existing 'central station service.'
>
> "In the case of Alabama Electric Cooperative v. Alabama Power Co., 278 Ala. 123, 176 So. 2d 483, 487 (1964), the court made the following statement:
>
> > " 'It has been consistently held that the legality of a loan approved by the Administrator of the REA is not subject to a collateral attack in a hearing before a public service commission or the duly constituted state authority which, in Alabama, is the Director of Finance. (Citing cases). In each of these decisions, the question of the violation of the central station service feature of the federal act was raised but, in each instance, the decision was in favor of the cooperatives. In view of the authorities cited supra, we feel that we cannot agree with the contention of appellees that this is a question on which we should pass.'

"Without deciding whether protestants have standing to raise this question we hold, as did the Alabama court, that this question is not a proper one to be raised in this proceeding."

It will be noted that the Court's reference to a showing "without dispute" of a violation of the terms of the loan agreement and of duplication of existing central station service was a statement of a position asserted by protestants (Petitioners here)—not a determination by the Court. Actually, the position asserted by Petitioner there (Respondent here) was that there had been no violation whatever of the loan agreement and no duplication of existing central station service. The court found it unnecessary to resolve the question since it was not properly before the court.

If the legality of the REA loan to Petitioner had been a proper question for determination in the State forums, it would have been readily determined to have been legal and proper in all respects; indeed a very salutary fulfillment of one of the dominant purposes of the RE Act (7 U.S.C.A., Section 904, et seq.). In Section 904, that Act expressly authorizes loans. ". . . for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service. . . ." It is clear that REA does not *exhaust* its lending powers with the initial loan or loans made to serve persons in rural areas not receiving central station service. The four distributing corporations to be served initially by Respondent (and Respondent's other corporate members for that matter) were initially financed by REA at the distribution level and are still so financed (R. 73, 11056-11163; R. 8, 708; R. 8, 860; R. 10, 978; R. 11, 1056).

The RE Act authorizes further financing from time to time for the service areas of these corporations to heavy up systems or add transmission or generating facilities, or both; and the generation and transmission facilities may be provided by loans to the distributing corporations directly or to a federation of which they are members or to any other eligible borrower—as long as the service reaches the people of these areas through eligible REA borrowers.

It was expressly so held in the *Kansas City* case, supra, when it was heard on the merits in the U. S. District Court for the District of Columbia (115 F. Supp. 402) and this is still good authority even though when the case reached the Court of Appeals this question was not reached, that Court finding that the complaining commercial power companies had no legal standing or litigable interest to challenge the validity of a series of REA generation and transmission loans involved in the case.

In a publication entitled "Public Utilities Fortnightly" published by Public Utilities Reports, Inc. (publishers of PUR), issue of May 9, 1963, there appeared a treatise beginning on page 26 entitled "The Legal Bases for REA Loans," by Louis Gorrin, Director, REA Operations Division, Office of the General Counsel, United States Department of Agriculture, which covers this question fully, including legislative history, in which cases and other authorities are cited. It leaves no doubt that the loan to Respondent came just in the way the Congress contemplated and authorized, that is to say, it was made some time after the initial loans to Respondent's corporate members (distributing corporations) upon the basis of need and to serve the requirements of more than one of the distributing corporations. As pointed out in the treatise, Senator Norris had said during the debates on the bill that a generation and transmission system when

needed and financed would for economic reasons serve more than one distributing corporation, perhaps "a half dozen or a dozen" (80 *Congressional Record* 2756).

The treatise refers to Opinion No. 4981 of the Solicitor, Department of Agriculture, dated May 26, 1944, covering this point, which Opinion has been on file with the Congress for a number of years (in connection with efforts of commercial power companies to induce the Congress to limit the loan-making authority of REA on generation and transmission loans); and may be said to have been accepted as expressive of the original Congressional intent as well as that of the present, nothing having been done to in anywise diminish the Administrator's authority to make such loans as outlined therein despite the repeated efforts of the commercial power companies (including Petitioners) to have that authority limited by Congressional enactment.

A copy of the treatise is annexed as Appendix 2, and a copy of the Solicitor's Opinion is annexed as Appendix 3.

Petitioners cite but one case on this proposition, to-wit: *Puente de Reynosa* v. *City of McAllen*, 357 F. 2d 43 (C.A.5 1966). The case is not in point. There Puente de Reynosa owned the Mexican end and McAllen owned the American end of an international bridge over the Rio Grande River; McAllen and another concessionarie of the Republic of Mexico commenced construction of another and more modern bridge across the Rio Grande fifty-one feet away, the operation of which would be certain to severely injure if not destroy entirely the value of Puente de Reynosa's interest in the old bridge (both were toll bridges). Puente de Reynosa sued in the U. S. District Court to enjoin McAllen alleging that special permission of the Congress of the United States was required to

build the proposed new bridge but was not obtained, therefore, if McAllen were permitted to complete and operate the bridge, it would by means of operating a business in violation of law destroy Puente de Reynosa's property. The Court held that in those circumstances Puente de Reynosa had standing to sue.

If Respondent builds and operates its generation and transmission system to supply power previously supplied by Petitioners, Respondent will not thereby be operating a business in violation of law regardless of where it obtains financing. Moreover, Puente de Raynosa *owned* the Mexican half of the bridge and a perpetual franchise from the Republic of Mexico to operate it. Here, Petitioners have certificates which have been held to be effective as to the power supplies involved only so long as the distributing corporations choose to purchase from petitioners and the public convenience and necessity is subserved thereby (this being the meaning of state statutes as determined by the State Court of last resort and therefore their accepted meaning in this Court).

It will be noted that the *Puente de Reynosa* case was decided by the Court of Appeals, Fifth Circuit, February 15, 1966; the same Court which had on January 13, 1966 (rehearing denied February 7, 1966) decided the case of *Rural Electrification Administration et al.* v. *Central Louisiana Elec. Co., Inc., et al.*, supra, holding by an unusually forceful opinion that the commercial power companies in Louisiana had no standing to litigate and the court had no jurisdiction to review the validity *vel non* of a REA loan to a Louisiana generation and transmission cooperative. It is certain that that Court did not intend by the *Puente de Reynosa* case to overrule its decision in the *Rural Electrification* case in which it had just eight days earlier denied a petition for rehearing.

It is respectfully submitted that the Petition for a Writ of Certiorari herein should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, T. Harvey Hedgepeth, one of the attorneys of record for South Mississippi Electric Power Association, a Respondent in the above-styled cause, and a member of the Bar of the Supreme Court of the United States, certify that I have this day served the foregoing brief upon Petitioners and other interested persons in the following manner: by depositing copies thereof in sealed envelopes in the United States Post Office at Jackson, Mississippi, first class postage prepaid, properly addressed to each of the attorneys of record of such parties and other interested persons, to-wit: James S. Eaton, Esquire, 2300 Fourteenth Street, Gulfport, Mississippi, Attorney for Petitioner Mississippi Power Company; Thomas H. Watkins, Esquire, Plaza Building, Jackson, Mississippi, Attorney for Peti-

tioner Mississippi Power Company; Sherwood W. Wise, Esquire, Electric Building, Jackson, Mississippi, Attorney for Petitioner Mississippi Power & Light Company; John K. Keyes, Esquire, Collins, Mississippi, Attorney in the court below, and John H. Price, Jr., Esquire, Deposit Guaranty Bank Building, Jackson, Mississippi, Attorney of Record in this Court for Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Association, and Pearl River Valley Electric Power Association, Respondents herein; and Bennett E. Smith, Esquire, Assistant Attorney General of the State of Mississippi, State Office Building, Jackson, Mississippi, Attorney for Mississippi Public Service Commission.

This July 1...., 1966.

T. HARVEY HEDGEPETH